No. 95-1858

In The

Supreme Court of the United States

October Term, 1996

DENNIS C. VACCO, Attorney General of the State of New York, GEORGE E. PATAKI, Governor of the State of New York, ROBERT M. MORGENTHAU, District Attorney of New York County,

Petitioners,

v.

TIMOTHY E. QUILL, M.D., SAMUEL C. KLAGSBRUN, M.D., and HOWARD A. GROSSMAN, M.D.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICI CURIAE* STATES OF CALIFORNIA, ALABAMA, COLORADO, FLORIDA, GEORGIA, ILLINOIS, IOWA, LOUISIANA, MARYLAND, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEW HAMPSHIRE, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, VIRGINIA AND WASHINGTON AND THE COMMONWEALTH OF PUERTO RICO IN SUPPORT OF PETITIONERS DENNIS C. VACCO, ET AL.

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INTEREST OF THE *AMICI* STATES

The decision below represents a return to an era, long since past, when the principles of federalism were all but eliminated by the mistaken notion that the Fourteenth Amendment authorizes courts to substitute their judgment for that of the States in matters of economic and social welfare. In an opinion which significantly departs from this Court's present-day equal protection jurisprudence, the Second Circuit has declared that New York's prohibition of assisted suicide violates the Equal Protection Clause of the Fourteenth Amendment to the extent that it prohibits a physician from prescribing a lethal dose of medication for self-administration by a mentally-competent, terminally ill patient in the final stages of his or her illness. *Quill v. Vacco*, 80 F.3d 716, 731 (2d Cir. 1996) (hereinafter "*Quill*"), *cert. granted*, ___U.S.___ (1996 WL 282544) (1996). In so holding, the Second Circuit found that New York's prohibition of assisted suicide did not further, and thus was not rationally related to, ***any*** legitimate state interest. *Quill*, 80 F.3d at 729-731.

More troubling than the serious flaws in the Court's analysis is the impact of its holding which negates the ability of the States to protect the lives of their citizens and, at the same time, undercuts accepted understandings of federalism. The protection and preservation of human life is, without question, the quintessential duty and responsibility of the sovereign States in our federal system of government. The power of the States to fulfill this most important of responsibilities, through the exercise of the police power, is likewise unquestionable.[1] Indeed, as Justice Harlan observed in his famous dissent in *Lochner v. New York*, "[a]ll the cases agree that . . . [the States' police] power extends at least to the protection of the lives, the health, and the safety of the public against the injurious exercise by any citizen of his own

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[1] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." U.S. Const. amend. X.

rights."[2] *Lochner v. New York*, 198 U.S. 45, 65 (1905) (Harlan, J., dissenting). "[A]ll states provide for the involuntary commitment of persons who may harm themselves as the result of mental illness, and a number of states allow the use of nondeadly force to thwart suicide attempts." *People v. Kevorkian*, 447 Mich. 436, 479, 527 N.W.2d 714, 732 (1994) (footnotes omitted), *cert. denied*, 115 S.Ct. 1795 (1995). The overwhelming majority of States impose criminal penalties on one who assists another to commit suicide. *See* n.19, *infra*.

At stake in this case are, first and foremost, the lives of the people, both those who wish to die and those who wish to live no matter what their circumstances. Also at stake is the sovereign power of the States to protect and preserve those lives without a federal requirement that the State "make judgments about the 'quality' of life that a particular individual may enjoy, . . . " *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 282 (1990). The Court's decision in this case will directly affect the people of all the States of the Union. It will also determine whether "the States *as States* have [any] legitimate interests which the National Government is bound to respect even though its laws are supreme." *Garcia v. San Antonio Metro.*, 469 U.S. 528, 581 (1985) (O'Connor, J., dissenting) (italics original, citation omitted, insert added).

SUMMARY OF ARGUMENT

The question presented in this case is whether the State of New York's prohibition of assisted suicide violates the Equal Protection Clause of the Fourteenth Amendment. The resolution of this question will have profound implications for the continued viability of the States in our federal system of

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[2] "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." James Madison, *The Federalist* No. 45, at 2:82 (1788).

government. Over a century ago, this Court, describing the dual sovereignty of the States and Federal Government, declared that:

> The preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.[3]

A proper balance of power between the States and National government "preserves to the people numerous advantages", not the least of which "is a check on abuses of government power." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). However, as Justice O'Connor, writing for the majority in *Gregory*, cautioned, "[t]hese twin powers will act as mutual restraints only if both are credible. In the tension between federal and state power lies the promise of liberty." *Id.*, at 459. While the question presented in this case is one of equal protection,[4] the real question is whether the States will continue to retain their sovereign authority in a system in which "[t]he Federal Government holds a decided advantage . . . the Supremacy Clause." *Id.*, at 460.

In the case below, the Second Circuit declared that New York's prohibition of assisted suicide violates the Equal Protection Clause of the Fourteenth Amendment. *Quill*, 80 F.3d

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[3] *Texas v. White*, 7 Wall. 700, 725 (1869), *quoting Lane County v. Oregon*, 7 Wall. 71, 76 (1869). *See also Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) ("We begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause.")

[4] *San Antonio School District v. Rodriguez*, 411 U.S. 1, 44 (1973) ("It must be remembered, also, that every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system. Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny.").

at 731. The centerpiece of the Second Circuit's opinion was its conclusion that terminally ill persons on life support who wish to "hasten death"[5] by directing the withdrawal of such systems are similarly situated with others who wish to "hasten death by self-administering prescribed drugs." *Quill*, 80 F.3d at 729. However, "those courts that have found a right to refuse to begin or to continue life-sustaining medical treatment have done so only after concluding that such refusal is wholly different from the act of suicide."[6] Legislatures in forty-seven of the fifty States (including New York) have likewise recognized this fundamental distinction. *See* ns. 14-16, *infra*. Notwithstanding this overwhelming authority to the contrary, the Second Circuit erroneously concluded the two situations are indistinguishable. *Quill*, 80 F.3d at 729. By doing so, it created a class of similarly situated persons where, in fact, none existed. As will be seen, the Second Circuit's failure to recognize this critical distinction infected its constitutional analysis, contributed to its misplaced reliance on right-to-refuse treatment cases, and led directly to its ultimate erroneous conclusion.

In the case below, the Second Circuit correctly found that New York's statutes prohibiting assisted suicide neither impinge upon fundamental rights nor create suspect classifications and, thus, that the rational-basis standard of review

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[5] There is a danger in using euphemistic language such as "hasten death" when referring to the act of suicide. The term "hasten death" incorrectly implies a natural process being hurried along as opposed to the intentional act of terminating life artificially. Such language has a tendency to obfuscate the reality of the important questions which end-of-life cases generally present. *See People v. Kevorkian*, 447 Mich. 436, 464 n.27, 527 N.W.2d 714, 725 n.27 (1994), *cert. denied*, 115 S.Ct. 1795 (1995), and *Cruzan v. Harmon*, 760 S.W.2d 408, 412 (Mo. banc 1988), *aff'd sub nom. Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990).

[6] *People v. Kevorkian*, 447 Mich. 436, 480, 527 N.W.2d 714, 732 (1994) (footnote omitted), *cert. denied*, 115 S.Ct. 1795 (1995). *See* n.12, *infra*, and cases cited therein. *But see Compassion in Dying v. State of Washington*, 79 F.3d 790 (9th Cir. 1996), *cert. granted*, ___ U.S. ___ (1996 WL 411596) (1996).

applied. *Quill*, 80 F.3d at 726-727. However, it failed to properly apply that standard in accordance with the clear precedents of this Court. Simply put, while the Second Circuit invoked rational-basis language, that was not the standard it applied.

The Second Circuit's analysis was further flawed by the improper insertion of quality-of-life considerations which it used to discount the State's important interests in the protection and preservation of human life. *Quill*, 80 F.3d at 729-730. In addition to being contrary to the Court's holding in *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 262, 282 (1990), such an analysis also disregards the irrefutable principle that all lives, from beginning to end and irrespective of physical or mental condition, are under the full protection of the law.

Finally, the Second Circuit suggested several alternative methods by which the State of New York could achieve its legitimate objectives. However, the fact that a State may, if it chooses, seek to achieve its legitimate objectives through other means does not, in any way, establish that the means actually selected are either irrational or arbitrary. In short, had the Second Circuit applied the rational-basis standard of review in accordance with the precedents of this Court, New York's prohibition of assisted suicide clearly would have passed constitutional muster.

ARGUMENT

I. NEW YORK'S PROHIBITION OF ASSISTED SUICIDE DOES NOT TREAT SIMILARLY SITUATED PERSONS IN AN UNEQUAL MANNER

The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985) (citation omitted). In order to establish an equal protection violation, there must be a showing that the State has adopted a classification which treats similarly situated

persons in an unequal manner.[7] That cannot possibly be established here. First, under the plain language of the statutes at issue, *all* persons, regardless of their circumstances, are prohibited from intentionally aiding another person to attempt or commit suicide.[8] Thus, on their face, the challenged statutes create no classifications at all.[9] Second, neither statute has been applied in this case, *i.e.*, none of the respondents have been charged with any violation of section 125.15(3) or 120.30.[10] Thus, to the extent that New York law classifies at all, that classification is clearly neutral.[11]

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[7] *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374 (1886). *See also In re Eric J.*, 25 Cal.3d 522, 530, 159 Cal.Rptr. 317, 320 (1979) ("The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner. [italics original, citation and footnote omitted]").

[8] Section 125.15 of the New York Penal Law, entitled "Manslaughter in the second degree," provides in pertinent part that "A person is guilty of manslaughter in the second degree when: . . . (3) He intentionally causes or aids another person to commit suicide. Manslaughter in the second degree is a class C felony." N.Y. Penal Law § 125.15(3) (McKinney 1987). Section 120.30 of the New York Penal Law, entitled "Promoting a suicide attempt," provides that "A person is guilty of promoting a suicide attempt when he intentionally causes or aids another person to attempt suicide. Promoting a suicide attempt is a class E felony." N.Y. Penal Law § 120.30 (McKinney 1987).

[9] To the extent that the Second Circuit's opinion can be viewed as being based on the concept of overbreadth, *i.e.*, that the challenged statutes sweep too broadly, it is plainly inconsistent with previous holdings of this Court. While a finding of overbreadth or " 'overreaching' " may be significant where First Amendment considerations are present, the concept has no application here. *Dandridge v. Williams*, 397 U.S. 471, 484-485 (1970).

[10] While a grand jury proceeding was instituted against one of the respondents in this case, Dr. Quill, no indictment was returned. *Quill v. Koppell*, 870 F.Supp. 78, 82 (S.D.N.Y. 1994), *aff'd in part and rev'd in part sub nom. Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996).

[11] Of course, the fact that a neutral statute may have a disproportionate negative impact on a particular group does not, standing alone, establish a violation of equal protection. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 271-273 (1979). *See also Washington v. Davis*, 426 U.S. 229, 242 (1976) ("[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.") Rather, in such a situation it must also be shown that the affected group has historically been the victim of discrimination and, further, that the statute was enacted for a discriminatory purpose. *Feeney*, 442 U.S. at 273-274. That cannot possibly be established here. In the case below, the Second Circuit did not find that terminally ill persons had experienced "a history of purposeful unequal treatment" (*San Antonio School District v. Rodriguez*, 411 U.S. 1, 28 (1973)), or that New York's prohibition of assisted suicide was enacted for the purpose of discriminating against terminally ill persons. "[T]he Fourteenth Amendment guarantees equal laws, not equal results." *Feeney*, at 273.

In *Quill*, the Second Circuit found a classification created not by the plain language of the challenged statutes, or by their application in a particular case, but rather based on its conclusion that the refusal of unwanted life-sustaining medical treatment is the equivalent of suicide and assisted suicide. *Quill*, 80 F.3d at 729. That conclusion, the centerpiece of the Second Circuit's opinion, was error.

A. The Refusal of Unwanted Life-Sustaining Medical Treatment Is Not The Equivalent Of Suicide Or Assisted Suicide, And Thus, New York's Prohibition Of Assisted Suicide Does Not Create A Class of Similarly Situated Persons

The Equal Protection Clause permits the States to determine, in the first instance, which persons are similarly situated and which are not. Indeed, it is well-settled that "[t]he initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States." *Plyer v. Doe*, 457 U.S. 202, 215 (1982). In the instant case, the States have made that determination: terminally ill persons who refuse unwanted life-sustaining medical treatment

are not similarly situated with other persons who wish to commit suicide or assisted suicide.

In landmark case of *In re Quinlan*, the New Jersey Supreme Court recognized that there is "a real distinction between the self-infliction of deadly harm and a self-determination against artificial life support or radical surgery, for instance, in the face of irreversible, painful and certain imminent death." *In re Quinlan*, 70 N.J. 10, 43, 355 A.2d 647, 665, *cert. denied*, 429 U.S. 922 (1976). Since *Quinlan*, courts which have recognized a right to refuse unwanted life-sustaining medical treatment have, at the same time, recognized that such refusal is fundamentally different from the act of suicide.[12] A typical example of this can be found in *People v. Kevorkian* wherein the Michigan Supreme Court stated that:

> [P]ersons who opt to discontinue life-sustaining

[12] *See, e.g., Satz v. Perlmutter*, 362 So.2d 160, 162-163 (Fla. DCA 1978), *aff'd*, 379 So.2d. 359 (Fla. 1980); *Von Holden v. Chapman*, 87 A.D.2d 66, 450 N.Y.S.2d 623, 627 (1982) ("essential dissimilarity" between right to decline medical treatment and any right to end one's life); *In re Conroy*, 98 N.J. 321, 351, 486 A.2d 1209, 1224 (1985) ("[D]eclining life-sustaining medical treatment may not properly be viewed as an attempt to commit suicide. Refusing medical intervention merely allows the disease to take its natural course; if death were to eventually occur, it would be the result, primarily, of the underlying disease, and not the result of a self-inflicted injury. [footnote omitted]"); *Bouvia v. Superior Court*, 179 Cal.App.3d 1127, 1145, 225 Cal.Rptr. 297, 306 (1986); *Bartling v. Superior Court*, 163 Cal.App.3d 186, 196, 209 Cal.Rptr. 220, 225-226 (1984); *People v. Adams*, 216 Cal.App.3d 1431, 1440, 265 Cal.Rptr. 568, 573-574 (1990); *Donaldson v. Lungren*, 2 Cal.App.4th 1614, 1619-1623, 4 Cal.Rptr.2d 59, 61-64 (1992) and cases cited therein; *Thor v. Superior Court*, 5 Cal.4th 725, 742, 21 Cal.Rptr.2d 357, 367-368 (1993) ("[A] necessary distinction exists between a person suffering from a serious life-threatening or debilitating injury who rejects medical intervention that only prolongs but never cures the affliction and an individual who deliberately sets in motion a course of events aimed at his or her own demise and attempts to enlist the assistance of others."); *DeGrella v. Elston*, 858 S.W.2d 698, 706-707 (Ky. 1993). *See also* Thomas J. Marzen, *et al.*, *Suicide: A Constitutional Right?*, 24 Duq. L. Rev. 1, 10 n.34 (1985), and cases cited therein.

> medical treatment are not, in effect, committing suicide. There is a difference between choosing a natural death summoned by an uninvited illness or calamity, and deliberately seeking to terminate one's life by resorting to death-inducing measures unrelated to the natural process of dying.[13]

Likewise, in *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990), this Court "assume[d] that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition" but, at the same time, recognized Missouri's important interest in the protection and preservation of human life, noting that "the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide." *Cruzan*, 497 U.S. at 279-280 (footnote omitted). Plainly, the majority in *Cruzan* had no difficulty at all distinguishing the right to refuse unwanted life-sustaining medical treatment from suicide and assisted suicide.

Today, forty-seven state legislatures also make the fundamental distinction between the refusal of unwanted life-sustaining medical treatment and the acts of suicide and assisted suicide in their natural death/living will statutes,[14] or their

[13] *People v. Kevorkian*, 447 Mich. 436, 472-473, 527 N.W.2d 714, 728-729 (1994) (*citing McKay v. Bergstedt*, 106 Nev. 808, 820, 801 P.2d 617 (1990)), *cert. denied*, 115 S.Ct. 1795 (1995). *See also* Yale Kamisar, *Are Laws against Assisted Suicide Unconstitutional?*, 23 Hastings Center Report, No. 3, 32, 33 (1993) ("The only right or liberty that the *Karen Ann Quinlan* case and subsequent so-called 'right to die' rulings have established is the right under certain circumstances to be disconnected from artificial life support systems or, as many have called it, the right to die *a natural death*. [italics original]").

[14] Ala. Code § 22-8A-10 (1990); Alaska Stat. § 18.12.080(f) (Michie 1994); Ariz. Rev. Stat. Ann. § 36-3210 (West Supp. 1995); Ark. Code Ann. § 20-17-210(g) (Michie 1991); Cal. Health & Safety Code § 7191.5(g) (West Supp. 1996); Colo. Rev. Stat. § 15-18-112(1) (West 1987); Fla. Stat. Ann. § 765.309(1) (West Supp. 1996); Ga. Code Ann. § 31-32-11(b) (1996); Haw. Rev. Stat. § 327D-13 (Supp. 1992); Ill. Comp. Ann. Stat. ch. 755, § 35/9(f) (Smith-Hurd 1992); Ind. Code Ann. § 16-36-4-19 (West

durable power of attorney for health care acts,[15] or both.[16] This fundamental distinction, now a national consensus, must today be considered a firmly established principle of American jurisprudence.

The rationale supporting this fundamental distinction is straightforward and based on obvious factual differences

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Supp. 1996); Iowa Code Ann. § 144A.11.6 (West 1989); Kan. Stat. Ann. § 65-28,109 (1992); Ky. Rev. Stat. Ann. § 311.639 (Michie 1995); La. Rev. Stat. Ann. § 40:1299.58.10(A) (West 1992); Me. Rev. Stat. Ann. tit. 18-A, § 5-813(c) (West Supp. 1995); Md. Health-Gen. Code Ann. § 5-611(c) (1994); Minn. Stat. Ann. § 145B.14 (West Supp. 1996); Miss. Code Ann. § 41-41-117(2) (1993); Mo. Ann. Stat. § 459.055(5) (West 1992); Mont. Code Ann. § 50-9-205(7) (1995); Neb. Rev. Stat. Ann. § 20-412(7) (Michie 1995); Nev. Rev. Stat. Ann. § 449.670(2) (Michie 1991); N.H. Rev. Stat. Ann. § 137-H:13 (1996); N.C. Gen. Stat. § 90-320(b) (1993); N.D. Cent. Code § 23-06.4-01 (1991); Ohio Rev. Code Ann. § 2133.12(D) (Anderson Supp. 1995); Okla. Stat. Ann. tit. 63, § 3101.12(G) (West Supp. 1996); Pa. Cons. Stat. Ann. tit. 20, § 5402(b) (West Supp. 1996); R.I. Gen. Laws § 23-4.11-10(f) (Supp. 1995); S.C. Code Ann. § 44-77-130 (Law Co-op. Supp. 1996); S.D. Codified Laws Ann. § 34-12D-20 (Michie 1994); Tex. Health & Safety Code Ann. § 672.020 (West 1992); Utah Code Ann. § 75-2-1118 (1993); Va. Code Ann. § 54.1-2990 (Michie 1994); Wash. Rev. Code Ann. § 70.122.100 (West Supp. 1996); W.Va. Code § 16-30-10 (1995), *see also* § 16-30C-14 (1995) (DNR orders); Wis. Stat. Ann. § 154.11(6) (West 1989); Wyo. Stat. § 35-22-109 (Michie 1994). *See also* D.C. Code Ann. § 6-2430 (1989).

[15] Act of July 12, 1982, § 3, 63 Del. Laws 821 (1981); Idaho Code § 39-152 (Supp. 1996) (DNR orders); Ill. Comp. Stat. Ann. ch. 755, § 40/50 (Smith-Hurd 1992); Ind. Code Ann. §§ 16-36-1-12(c), 16-36-1-13 (West Supp. 1996), *see also* § 30-5-5-17(b) (West 1994); Iowa Code Ann. § 144B.12.2 (West Supp. 1996); Mass. Gen. Laws Ann. ch. 201D, § 12 (West Supp. 1996); Mich. Comp. Laws Ann. § 700.496(20) (West 1995); N.Y. Pub. Health Law § 2989(3) (McKinney 1993); N.D. Cent. Code § 23-06.5-01 (1991); R.I. Gen. Laws § 23-4.10-9(f) (Supp. 1995); Wyo. Stat. § 3-5-211 (Michie Supp. 1996).

[16] *See* notes 14 and 15, *supra*. *See also* Conn. Gen. Stat. Ann. § 19a-575 (West Supp. 1996) (form declarations); N.J. Stat. Ann. § 26:2H-54(d)-(e) (West 1996) (legislative findings); N.M. Stat. Ann. § 24-7A-13(C) (Michie Supp. 1995).

between the two situations. When a terminally ill person accepts life-sustaining treatment, he or she is authorizing the invasion of bodily integrity which necessarily accompanies that treatment. The fact that this class of persons must sacrifice their bodily integrity in order to continue living plainly demonstrates they are not similarly situated with any other class. Furthermore, "[a] person may refuse life-sustaining medical treatment because the treatment itself is a violation of bodily integrity."[17] In sharp contrast, suicide and assisted suicide do not implicate a person's right to protect bodily integrity or right to refuse unwanted medical treatment.

Our Nation's history and tradition fully supports the States' determination that these two situations are not the same. The right to refuse unwanted medical treatment is derived from the common-law doctrine of informed consent which embodies the "notion of bodily integrity." *Cruzan*, 497 U.S. at 269 and 270. As the Court observed in *Cruzan*, "[t]he informed consent doctrine has become firmly entrenched in American tort law." *Id.* In sharp contrast, opposition to suicide is deeply rooted in our Nation's history and tradition,[18] and assisted suicide remains a crime in the overwhelming majority of States.[19]

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[17] *People v. Kevorkian*, 447 Mich. 436, 480 n.59, 527 N.W.2d 714, 732 n.59 (1994), *cert. denied*, 115 S.Ct. 1795 (1995).

[18] *See In re Joseph G.*, 34 Cal.3d 429, 433-435, 194 Cal.Rptr. 163, 165 (1983) (reviewing development of the law with respect to suicide and related crimes); *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 294-295 (1990) (Scalia, J., concurring) (reviewing our Nation's historical and traditional opposition to suicide and assisted suicide); Thomas J. Marzen, *et al.*, *Suicide, A Constitutional Right?*, 24 Duq. L. Rev. 1, 100 (1985) (concluding that "the weight of authority in the United States, from colonial days through at least the 1970's has demonstrated that the predominant attitude of society and the law has been one of opposition to suicide.").

[19] The following States, plus Puerto Rico and the Virgin Islands, expressly prohibit assisted suicide by statute: Alaska Stat., § 11.41.120(a)(2) (Michie 1989); Ariz. Rev. Stat. Ann., § 13-1103(A)(3) (West Supp. 1995); Ark. Stat. Ann., § 5-10-104(a)(2) (Michie 1993); Cal.

In summary, suicide and assisted suicide are so obviously different from the refusal of unwanted medical treatment, and its legal underpinnings, that persons exercising the right to refuse such treatment simply cannot be considered similarly situated with those who wish to commit suicide or assisted suicide. By failing to recognize the obvious factual differences between the two situations, and our Nation's history and tradition with respect to each, the Second Circuit created a class of similarly situated persons where, in fact,

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Pen. Code, § 401 (West 1988); Colo. Rev. Stat., § 18-3-104(1)(b) (Supp. 1995); Conn. Gen. Stat. Ann., § 53a-56(a)(2) (West 1994); Del. Code Ann., tit. 11, § 645 (1995); Fla. Stat. Ann., § 782.08 (West 1992); Ga. Code Ann. § 16-5-5(b) (1996); Ill. Comp. Stat. Ann., ch. 720, 5/12-31(a)(2) (Smith-Hurd Supp. 1996); Ind. Stat. Ann., § 35-42-1-2.5(b) (West Supp. 1996); Iowa Code, §§ 707A.1, 707A.2 and 707A.3, as amended by Acts of the 76th General Assembly, 1996 Session; Kan. Stat. Ann., § 21-3406 (1995); Ky. Rev. Stat. Ann., § 216.302 (Michie 1995); La. Rev. Stat. Ann., § 14:32.12 (West Supp. 1996); Me. Rev. Stat. Ann., tit. 17-A, § 204 (West 1983); Minn. Stat. Ann., § 609.215 (West 1987 and Supp. 1996); Miss. Code Ann., § 97-3-49 (1994); Mo. Ann. Stat., § 565.023(1)(2) (West Supp. 1996); Mont. Code Ann., § 45-5-105 (1995); Neb. Rev. Stat. Ann., § 28-307 (Michie 1995); N.H. Rev. Stat. Ann., § 630:4 (1996); N.J. Stat. Ann., § 2C:11-6 (West 1995); N.M. Stat. Ann., § 30-2-4 (Michie 1994); N.Y. Penal Law, §§ 120.30, 125.15(3) (McKinney 1987); N.D. Cent. Code, § 12.1-16-04 (Supp. 1995); Okla. Stat. Ann., tit. 21, §§ 813, 814, 815 (West 1983); Pa. Cons. Stat. Ann., tit. 18, § 2505(b) (West 1983); P.R. Laws Ann., tit. 33, § 4009; R.I. Pub. Act 96-133, *to be codified as* R.I. Gen. Stat., tit. 11, ch. 60; S.D. Codified Laws Ann., § 22-16-37 (Michie 1988); Tenn. Code Ann., § 39-13-216 (Supp. 1995); Tex. Penal Code Ann., § 22.08 (West 1994); V.I. Code Ann., tit. 14, § 2141; Wash. Rev. Code Ann., § 9A.36.060 (West 1988); and Wis. Stat. Ann., § 940.12 (West 1996). *See also* Or. Rev. Stat. § 163.125(1)(b) (1993) (prohibiting assisted suicide generally), *but see* Or. Rev. Stat. § 127.800 *et seq.* (1996) (permitting physician-assisted suicide in certain circumstances). The following states impose criminal penalties by case law for assisting a suicide: *Commonwealth v. Mink*, 123 Mass. 422, 428-429 (1877); *People v. Kevorkian*, 447 Mich. 436, 493-497, 527 N.W.2d 714, 738-739 (1994), *cert. denied*, 115 S.Ct. 1795 (1995); *Blackburn v. State*, 23 Ohio St. 146, 163 (1872); *State v. Jones*, 86 S.C. 17, 22, 47, 67 S.E. 160, 162, 165 (1910); and *State v. Willis*, 255 N.C. 473, 477, 121 S.E.2d 854, 856-857 (1961).

none existed. "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1940).

B. The New York Authorities Relied Upon By The Second Circuit Do Not Support Its Conclusion That New York Has Recognized A Right To Commit Suicide Or "Hasten Death"

Even the New York authorities relied upon by the Second Circuit do not support its conclusion that New York has recognized a right to commit suicide, or as the Second Circuit phrased it, a right to "hasten death." The first case cited by the Second Circuit in its effort to create a bridge between the right to refuse medical treatment and a right to "hasten death" was *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 105 N.E. 92 (1914). *Quill*, 80 F.3d at 727. However, *Schloendorff* is simply an "informed consent" case, the pertinent portion of which this Court discussed in *Cruzan* as follows:

> Justice Cardozo, while on the Court of Appeals of New York, aptly described this doctrine [of informed consent]: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 129-130, 105 N.E. 92, 93 (1914).

Cruzan, 497 U.S. at 269. Plainly *Schloendorff*, which simply recognizes the doctrine of informed consent, does not support a right to "hasten death." Neither did Justice Cardozo.[20]

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[20] Margaret E. Hall, *Selected Writings of Benjamin Nathan Cardozo*, Law and Literature, III, *What Medicine Can Do for Laws*, 371, 388-390 (1947) ("Every now and then there crops up in popular journals a discussion of the problem of euthanasia. The query is propounded whether the privilege should be accorded to a physician of putting a patient painlessly out of the world when there is an incurable disease, agonizing

The Second Circuit then cited *Matter of Storar* and *Eichner v. Dillon* (decided together), 52 N.Y.2d 363, 420 N.E.2d 64, *cert. denied*, 454 U.S. 858 (1981), for the proposition that "[i]n both these cases, the New York Court of Appeals recognized the right of a competent, terminally-ill patient to hasten his death upon proper proof of his desire to do so." *Quill*, 80 F.3d at 727. *Storar* and *Eichner*, however, are both right to refuse treatment cases. The phrase "hasten his death" incorrectly implies that the New York Court of Appeals approved not only the right to refuse unwanted medical treatment, but also the act of suicide. It did not. Moreover, in relying on these cases, the Second Circuit ignored the far more relevant part of the majority opinion which recognized that "[t]he State has a legitimate interest in protecting the lives of its citizens. . . . It may, by statute, prohibit them from engaging in specified activities, including medical procedures which are inherently hazardous to their lives." *Matter of Storar*, 52 N.Y.2d 363, 377, 420 N.E.2d 64, 71 (citation omitted, insert added), *cert. denied*, 454 U.S. 858 (1981).

Further review of the majority opinion reveals even more evidence that the New York Court of Appeals did not impliedly approve of suicide (*i.e.*, "hastening death"). First, the New York Court of Appeals specifically noted that the State's interest in preventing suicide was *not* implicated in the *Eichner* case. *Matter of Storar*, 52 N.Y.2d at 377 n.6. Second, noting the need for judicial restraint, the majority found it unnecessary on the facts of the cases before it to address the dissent's endorsement of a limited form of passive euthanasia. *Matter of Storar*, 52 N.Y.2d at 370 n.2. In view of the foregoing, the Second Circuit's reliance on *Storar* and *Eichner* was clearly misplaced.

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suffering, and a request by the sufferer for merciful release. No such privilege is known to our law, which shrinks from any abbreviation of the span of life, shaping its policy in that regard partly under the dominance of the precepts of religion and partly in the fear of error or abuse. Just as a life may not be shortened, so its value must be held as equal to that of any other, the mightiest or the lowliest.").

The Second Circuit also relied on *Rivers v. Katz*, 67 N.Y.2d 485, 495 N.E.2d 337 (1986), for the proposition that the New York Court of Appeals had "recognized the right to bring on death by refusing medical treatment not only as a fundamental common-law right but also as coextensive with [a] patient's liberty interest protected by the due process clause of our State Constitution." *Quill*, 80 F.3d at 727 (internal quotes and citation omitted, insert original). Again, this is incorrect. In *Rivers*, the New York Court of Appeals did not mention any "right to bring on death," a phrase which again incorrectly implies approval of the act of suicide. Rather, the right which the court recognized, as evidenced from the text of the opinion itself, was *the right to refuse unwanted medical treatment*. *Rivers*, 67 N.Y.2d at 493.

The Second Circuit also relied on both Article 29-B of New York Public Health Law, entitled "Orders Not to Resuscitate", sections 2960-2979, and Article 29-C, entitled "Health Care Agents and Proxies", sections 2980-2994, for the proposition that "the New York legislature [has] placed its imprimatur upon the right of competent citizens to hasten death by refusing medical treatment and by directing physicians to remove life-support systems already in place." *Quill*, 80 F.3d at 727 (insert added). Again, this is incorrect. As a review of these statutes plainly reveals, the New York legislature did not recognize any right to "hasten death," rather, it recognized the right to refuse medical treatment.[21] Moreover, in relying on these statutes, the Second Circuit ignored the far more relevant statute, New York Public Health Law, Article 29-C, § 2989(3), which specifically provides that:

> This article is not intended to permit or promote suicide, assisted suicide, or euthanasia; accordingly, nothing herein shall be construed to

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[21] *See, e.g.*, New York Public Health Law, Article 29-B, § 2964 (recognizing right of adult with capacity to consent to an order not to resuscitate), and Article 29-C, § 2981 (allowing for appointment of an agent "to make health care decisions on the principal's behalf").

> permit an agent to consent to any act or omission to which the principal could not consent under law.[22]

This statute directly contradicts the Second Circuit's contention that the New York legislature has either expressly or impliedly approved of suicide or assisted suicide. Plainly, it has not. In summary, none of the New York authorities discussed above support the contention that the State of New York has recognized a right to commit suicide or, as the Second Circuit phrased it, a right to "hasten death." Rather, what the State of New York has recognized is the right to refuse unwanted medical treatment, regardless of the consequences of that refusal.

The final authority relied upon by the Second Circuit in its effort to equate the withdrawal of life-sustaining medical treatment with the act of suicide is *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990). However, like its reliance on New York law, that reliance is entirely misplaced. While the Second Circuit discussed several portions of the *Cruzan* opinion at length, it ignored the far more relevant portion of the opinion for present purposes, *i.e.*, the recognition by the majority that even in the face of a right to refuse medical treatment, the State may properly assert important interests in the protection and preservation of human life, and in the prevention of both suicide and assisted suicide. *Cruzan*, 497 U.S. at 280. In summary, none of the authorities relied upon by the Second Circuit support its attempt to create a bridge between the right to refuse unwanted medical treatment, including that necessary to sustain life, and a right to commit suicide or assisted suicide.

II. NEW YORK'S PROHIBITION OF ASSISTED SUICIDE IS RATIONALLY RELATED TO NUMEROUS IMPORTANT GOVERNMENTAL OBJECTIVES

Should this Court find a state-determined class of similarly situated persons, it then becomes necessary to test

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[22] *See also* New York Public Health Law, Article 29-B, § 2962 (creating a presumption in favor of resuscitation, thus, further evidencing New York's strong state policy in favor of preserving life).

whether that classification "has been drawn in such a manner as to bear some rational relationship to a legitimate state end."[23] Part of the answer to this question "lies in remembering that our Constitution is an instrument of federalism" and that "maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action." *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 532 (1959) (Brennan, J., concurring).

It is well-settled that "[t]he Equal Protection Clause allows the States considerable leeway to enact legislation that may appear to affect similarly situated people differently." *Clements v. Fashing*, 457 U.S. 957, 962-963 (1982) (plurality opinion).

> [W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.

Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 441-442 (1985). *See also FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-314 (1993) ("This standard of review is a paradigm of judicial restraint.")

Indeed, this Court has repeatedly observed that " . . . [The rational-basis standard] is true to the principle that the Fourteenth Amendment gives the federal courts no power

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[23] *Clements v. Fashing*, 457 U.S. 957, 963 (1982) (plurality opinion). *See also Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-458 (1988) ("Unless a statute provokes strict judicial scrutiny because it interferes with a fundamental right or discriminates against a suspect class, it will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose. [internal quotes and citations omitted]").

to impose upon the States their views of what constitutes wise economic or social policy." *Dallas v. Stanglin*, 490 U.S. 19, 27 (1989) (insert original, internal quotes omitted), *citing Dandridge v. Williams*, 397 U.S. 471, 485-486 (1970). Review under the rational-basis standard "is the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause." *Dallas v. Stanglin*, 490 U.S. 19, 26 (1989).

> Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

McGowan v. Maryland, 366 U.S. 420, 425-426 (1961). *See also Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

As Justice Stewart observed in his concurring opinion in *San Antonio School District v. Rodriguez*, 411 U.S. 1, 60 (1973), "[t]his doctrine is no more than a specific application of one of the first principles of constitutional adjudication – the basic presumption of constitutional validity of a duly enacted state or federal law. [citation omitted]" Thus, under the rational-basis standard, legislation is first presumed valid and then, shielded by that presumption, tested to determine if the classification it creates is rationally related to a legitimate state interest.[24]

In discussing this presumption in *Quill*, the Second Circuit stated: "[t]he general rule . . . is that state legislation

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[24] *See Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985) ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. [citations omitted]").

carries a presumption of validity *if* the statutory classification is 'rationally related to a legitimate state interest.' [citation omitted]" *Quill*, 80 F.3d at 725 (emphasis added). This is incorrect. The existence of the presumption of validity is not conditioned upon a subsequent finding of rational relationship; rather, the presumption *precedes* application of the standard itself.[25] The Second Circuit's apparent failure to accord New York's statutes the presumption of validity to which they are entitled may provide at least some explanation why the Court utilized such a strict, skeptical, means-end analysis to review the challenged statutes.

While the Second Circuit did identify several important state interests implicated by New York's prohibition of assisted suicide, it went on to conclude that "[t]he New York statutes prohibiting assisted suicide, which are similar to the Washington statute, do not serve any of the state interests noted, *in view of the statutory and common law schemes allowing suicide through the withdrawal of life-sustaining treatment.*"[26] *Quill*, 80 F.3d at 730 (italics added).

This holding, like its misidentification of a similarly situated class, is based on the Second Circuit's failure to differentiate between the refusal of unwanted life-sustaining medical treatment and the acts of suicide and assisted suicide. Once this recurrent error is removed from the analysis, however, it immediately becomes clear that New York's prohibition of assisted suicide directly furthers, and thus is rationally

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[25] *See Heller v. Doe*, 509 U.S. 312, 319-320 (1993) ("For these reasons, a classification neither involving fundamental rights nor proceedings along suspect lines is accorded *a strong presumption of validity*. [emphasis added]"); *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314-315 (1993) ("On rational-basis review, a classification in a statute such as the Cable Act comes to us bearing *a strong presumption of validity*, . . . and those attacking the rationality of the legislative classification have the burden 'to negate every conceivable basis which might support it,' . . . [citations omitted, emphasis added]").

[26] It is noteworthy that, at this point in its opinion, the Second Circuit abandoned the euphemism "hasten death" and, in its place, substituted the word "suicide."

related to, several important state interests. Those interests include, but are not limited to: (1) the protection and preservation of human life;[27] (2) the prevention of suicide;[28] (3) preventing the fraud, errors and abuse which would accompany acceptance of suicide and assisted suicide;[29] (4) maintaining the ethical integrity of the medical profession;[30] (5) protecting the poor and minorities from

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[27] *Cruzan*, 497 U.S. at 280.

[28] "Suicide is the eighth leading cause of death in the United States." New York State Task Force Report, *When Death is Sought – Assisted Suicide and Euthanasia in the Medical Context* (May 1994), at 9 (footnote omitted) (hereinafter "*When Death is Sought*"). "Studies that examine the psychological background of individuals who kill themselves show that 95 percent have a diagnosable mental disorder at the time of death." *Id.*, at 11. Furthermore, "[l]ike other suicidal individuals, patients who desire suicide or an early death during a terminal illness are usually suffering from a treatable mental illness, most commonly depression." *Id.*, at 13 (footnote omitted).

[29] *Cruzan*, 497 U.S. at 281 ("[E]ven where family members are present, [t]here will, of course, be some unfortunate situations in which family members will not act to protect a patient. A State is entitled to guard against potential abuses in such situations. [citation and internal quotes omitted]"). *See also Donaldson v. Lungren*, 2 Cal.App.4th 1614, 1623, 4 Cal.Rptr. 59, 64 (1992) ("The state's interest must prevail over the individual because of the difficulty, if not the impossibility, of evaluating the motives of the assister or determining the presence of undue influence."), and *Donaldson*, 2 Cal.App.4th at 1624 ("Third parties, even family members, do not always act to protect the person whose life will end.").

[30] *Cf. Middlesex Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 434 (1982) (important state interest in "maintaining and assuring the professional conduct of professional attorneys it licenses"). *See also Donaldson v. Lungren*, 2 Cal.App.4th 1614, 1620, 4 Cal.Rptr.2d 59, 62 (1992) (recognizing state interest in maintaining the ethical integrity of the medical profession). In reaffirming its long-standing opposition to physician-assisted suicide, the American Medical Association has declared that physician-assisted suicide "threatens the very core of the medical profession's ethical integrity" and is "fundamentally inconsistent with the physician's professional role." American Medical Association, Council on Ethical and Judicial Affairs, *Code of Medical Ethics Reports*, Vol. V, No. 2

exploitation;[31] (6) protecting handicapped persons from societal indifference;[32] and (7) protecting innocent third parties.[33] Under the rational-basis standard, this should have been more than enough to establish the constitutionality of the challenged statutes.[34] However, in the case below, there was much more.

In 1985, then New York Governor Mario Cuomo convened the New York State Task Force on Life and the Law which he charged with responsibility to develop public policy recommendations on issues raised by medical advances. In May of 1994, the Task Force issued its 181 page report, *When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context*, which has been characterized by one federal Court of Appeals as "[t]he most comprehensive study of our subject by a governmental body . . . " *Compassion in Dying v. State of Washington*, 49 F.3d 586, 591-592 (9th Cir. 1995), *superseded by* 79 F.3d 790 (9th Cir. 1996). The Task Force unanimously recommended that New York's laws prohibiting assisted suicide and euthanasia should not be changed. *When Death is Sought*, at vii.

> After lengthy deliberations, the Task Force unanimously concluded that the dangers of such a dramatic change in public policy would far outweigh

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(July 1994), Report 59, *Physician-Assisted Suicide*, 269 and 274, respectively.

[31] *Quill*, 80 F.3d at 730, *citing Compassion in Dying v. State of Washington*, 49 F.3d 586, 592 (9th Cir. 1995), *superseded by* 79 F.3d 790 (9th Cir. 1996).

[32] *Quill*, 80 F.3d at 730, *citing Compassion in Dying v. State of Washington*, 49 F.3d 586, 592-593 (9th Cir. 1995), *superseded by* 79 F.3d 790 (9th Cir. 1996).

[33] *Application of President & Directors of Georgetown College, Inc.*, 118 U.S.App.D.C. 80, 331 F.2d 1000, 1008 (1964), *cert. denied*, 377 U.S. 978 (1964). *See also Bartling v. Superior Court*, 163 Cal.App.3d 186, 195 n.6, 209 Cal.Rptr. 220, 225 n.6 (1984).

[34] *Cf.* n.37, *infra*, and cases cited therein. *See also Heller v. Doe*, 509 U.S. 312, 320 (1993) ("A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification.").

> any possible benefits. In light of the pervasive failure of our health care system to treat pain and diagnose and treat depression, legalizing assisted suicide and euthanasia would be profoundly dangerous for many individuals who are ill and vulnerable. The risks would be most severe for those who are elderly, poor, socially disadvantaged, or without access to good medical care.[35]

While the Second Circuit was certainly aware of the Task Force Report (*see Quill*, 80 F.3d at 724, 730, and n.3), it plainly rejected it as an explanation of the "state of facts reasonably . . . conceived to justify [New York's prohibition of assisted suicide]." *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). That was error. It is difficult to imagine a more comprehensive explanation for a legislative decision. It is also difficult to imagine what is required under the rational-basis standard if the Task Force Report is insufficient.[36] In summary, had the Second Circuit applied the rational-basis standard of review in accordance with the precedents of this Court, New York's prohibition of assisted suicide clearly would have passed constitutional muster.[37]

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[35] *When Death is Sought*, at ix. *See also Id.*, at vii-viii. Since publication of the Task Force Report, the New York Legislature has taken no action to amend or repeal New York's prohibition of assisted suicide, N.Y. Penal Code, §§ 125.15(3) and 120.30.

[36] *Cf. Gregory v. Ashcroft*, 501 U.S. 452, 473 (1991) (finding Missouri mandatory retirement age of 70 for most state judges to be rationally related to a legitimate state interest, but noting that it "is founded on a generalization" which "may not be true at all."). *See also Heller v. Doe*, 509 U.S. 312, 321 (1993) ("Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends.").

[37] *Cf. McGowan v. Maryland*, 366 U.S. 420, 426 (1961); *Dandridge v. Williams*, 397 U.S. 471, 486 (1970); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 44-55 (1973); *Washington v. Davis*, 426 U.S. 229, 245 (1976); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 314 (1976); *Vance v. Bradley*, 440 U.S. 93, 98-102 (1979); *Bowen v. Owens*, 476 U.S. 340, 348-350 (1986); *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-465 (1988); *Dallas v. Stanglin*, 490 U.S. 19, 27 (1989); *Gregory v. Ashcroft*, 501 U.S. 452, 470-473 (1991).

III. THE SECOND CIRCUIT'S CONSTITUTIONAL ANALYSIS WAS FUNDAMENTALLY FLAWED BY THE IMPROPER INSERTION OF QUALITY-OF-LIFE CONSIDERATIONS

The Second Circuit's application of the rational-basis standard was further flawed by the improper insertion of quality-of-life considerations which it used to discount the State's important interests in the protection and preservation of human life. *Quill*, 80 F.3d at 729-730. In this regard, the Second Circuit stated: "[w]hat interest can the state possibly have in requiring the prolongation of a life that is all but ended? Surely, the state's interest lessens as the potential for life diminishes." *Quill*, 80 F.3d at 729-730 (citation omitted). The Second Circuit's characterization of the life at stake as one "that is all but ended" is based on the mistaken notion that the life at stake is of little, if any, value. Moreover, it is at this critical time, when life is "all but ended," that the person whose life is at stake is in greatest need of the State's protection. Indeed, as the Court observed in *Cruzan*, "even where family members are present, [t]here will, of course, be some unfortunate situations in which family members will not act to protect a patient. A State is entitled to guard against potential abuses in such situations."[38]

Such improper quality-of-life considerations are also directly contrary to this Court's holding in *Cruzan* that "a

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[38] *Cruzan*, 497 U.S. at 281 (citation and internal quotes omitted). *See also Donaldson v. Lungren*, 2 Cal.App.4th 1614, 1623, 4 Cal.Rptr. 59, 64 (1992) ("The state's interest must prevail over the individual because of the difficulty, if not the impossibility, of evaluating the motives of the assister or determining the presence of undue influence."), and *Donaldson*, 2 Cal.App.4th at 1624 ("Third parties, even family members, do not always act to protect the person whose life will end."). Of course, individual interests are not afforded any less protection simply because the government, rather than the individual, is defending them. *Cruzan*, 497 U.S. at 282 n.10.

State may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual." *Cruzan*, 497 U.S. at 282. The dangers inherent in using such quality-of-life considerations are well-recognized.[39] "Were quality of life at issue, persons with all manner of handicaps might find the state seeking to terminate their lives." *Cruzan v. Harmon*, 760 S.W.2d 408, 420 (Mo. banc 1988), *aff'd sub nom. Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990). An analysis such as that engaged in by the Second Circuit also disregards the irrefutable principle that all lives, from beginning to end and irrespective of physical or mental condition, are under the full protection of the law.

> The life of those to whom life has become a burden – of those who are hopelessly diseased or fatally wounded – nay, even the lives of criminals condemned to death, are under the protection of the law, equally as the lives of those who are in the full tide of life's enjoyment, and anxious to continue to live.

Blackburn v. State, 23 Ohio St. 146, 163 (1872).

In discounting the State's important interests in the protection and preservation of human life, the Second Circuit also relied upon broad generalities from the Court's opinion in *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992), on the nature of the liberty protected by the Fourteenth Amendment. *Quill*, 80 F.3d at 730. That reliance was particularly surprising since *Casey* itself reaffirms the States' "legitimate interests from the outset of the pregnancy in protecting the

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[39] *See, e.g., Mack v. Mack*, 618 A.2d 744, 760 (Md. 1993) ("As a logical progression from that precedent [patients in a persistent vegetative state], cases eventually would be presented submitting that the best interest of the most severely retarded and feebleminded, who require extended care, who have practically no cognition, and who are too disabled to feed themselves, would be to have sustenance withheld. [citation omitted]").

health of the woman and the life of the fetus that may become a child." *Casey*, 505 U.S. at 846. Nevertheless, the Second Circuit relied on *Casey* when it posed the following question:

> What concern prompts the state to interfere with a mentally competent patient's "right to define [his] own concept of existence, of meaning, of the universe, and of the mystery of human life," *Planned Parenthood v. Casey*, 505 U.S. 833, 851, 112 S.Ct. 2791, 2807, 120 L.Ed.2d 674 (1992), when the patient seeks to have drugs prescribed to end life during the final stages of a terminal illness? The greatly reduced interest of the state in preserving life compels the answer to these questions: "None."

Quill, 80 F.3d at 730 (insert original).

There are at least two fundamental flaws in the Second Circuit's reliance on *Casey* for this proposition. First, "[i]t is not the province of [the courts] . . . to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *San Antonio School District v. Rodriguez*, 411 U.S. 1, 33 (1973) (insert added). That, however, was precisely what the Second Circuit did in this case. Within the broad generalities on the nature of liberty contained in *Casey*, the Second Circuit created a new right "to have drugs prescribed to end life during the final stages of a terminal illness." *Quill*, 80 F.3d at 730. The creation of this new right – substantive due process in disguise – was error.

> Unlike other provisions of the Constitution, the Equal Protection Clause confers no substantive rights and creates no substantive liberties. The function of the Equal Protection Clause, rather, is simply to measure the validity of *classifications* created by state laws.

San Antonio School District v. Rodriguez, 411 U.S. 1, 59 (1973) (Stewart, J., concurring) (italics original, footnote omitted). Second, this is precisely the sort of "unlimited right to do with one's body as one pleases" which this Court has consistently and soundly rejected. *See Roe v. Wade*, 410 U.S. 113, 154 (1973); *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986); and *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 68

(1973), *citing*, *inter alia*, constitutionally unchallenged laws against suicide.

Finally, in *Quill*, the Second Circuit suggested that New York could achieve its objective of avoiding " 'psychological pressure' " on the elderly and infirm to choose death by "establish[ing] rules and procedures to assure that all choices [to commit assisted suicide] are free of such pressures." *Quill*, 80 F.3d at 730 (inserts added). With respect to the definition of "terminal illness," the Second Circuit suggested that "New York may define that stage of illness with greater particularity, require the opinion of more than one physician or impose any other obligation upon patients and physicians who collaborate in hastening death." *Quill*, 80 F.3d at 731 (footnote omitted). In the footnote which accompanies the above-quoted text, the Second Circuit went on to suggest numerous other ways in which the State of New York could achieve its objectives but still allow assisted suicide. *Quill*, 80 F.3d at 731 n.4.

This same argument – that the State may be able to achieve its objectives through alternative means – was rejected by the Court in *Dallas v. Stanglin* and, as in that case, "misapprehend[s] the nature of rational-basis scrutiny, which is the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause." *Dallas v. Stanglin*, 490 U.S. 19, 26-27 (1989). The fact that a State may, if it chooses, seek to achieve its legitimate objectives through other means does not, in any way, establish that the means actually selected are either irrational or arbitrary.[40]

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[40] *See San Antonio School District v. Rodriguez*, 411 U.S. 1, 51 (1973) (Texas system of financing public education does not fail, under rational basis standard, simply because other "less drastic" methods of satisfying the State's interest might be conceived); *Vance v. Bradley*, 440 U.S. 93, 102-103 n.20 (1979) ("irrelevant to equal protection analysis [under rational-basis standard] . . . that other alternatives that might achieve approximately the same results, . . . [insert added]"); *Heller v. Doe*, 509 U.S. 312, 329-330 (1993) (alternative methods of achieving state objective "irrelevant in rational-basis review.").

Moreover, "[t]he very complexity of the problems. . . suggests that there will be more than one constitutionally permissible method of solving them, and that, within the limits of rationality, the legislature's efforts to tackle the problems should be entitled to respect." *San Antonio School District v. Rodriguez*, 411 U.S. 1, 42 (1973) (internal quotes and citation omitted). Simply stated, it is not the business of this Court to attempt to resolve the myriad of complex ethical, moral, social, religious, medical, and philosophical problems presented by the issue of physician-assisted suicide.[41] In this regard, the words of the Court in *San Antonio School District v. Rodriguez*, 411 U.S. at 43, have equal application here:

> In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.

IV. THE DECISION BELOW SHOULD BE REVERSED IN ORDER TO PRESERVE THE ESSENTIAL ROLE OF THE STATES IN OUR FEDERAL SYSTEM OF GOVERNMENT AND THE POWER OF THE PEOPLE TO DIRECTLY GOVERN THEIR OWN AFFAIRS

With the ever-increasing power of medical science to prolong life, even in the face of what would otherwise be terminal illness, the States have had to strike a balance between the rights of the individual and "the demands of

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[41] *Cf. Dandridge v. Williams*, 397 U.S. 471, 487 (1970) ("the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court."). *See also* Daniel Callahan & Margot White, *The Legalization of Physician-Assisted Suicide: Creating a Regulatory Potemkin Village*, 30 U. Rich. L. Rev. 1 (1996) (surveying legislative activity in the United States regarding physician-assisted suicide and discussing why successful regulation would be impossible in both principle and practice).

organized society." *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). That balance is grounded in the States' recognition of their responsibility to protect both individual liberty and, at the same time, the lives of the people, both those who wish to die and those who wish to live no matter what their circumstances. In striking that balance, the States have drawn a line between an individual's right to refuse unwanted medical treatment and killing oneself, with or without the assistance of another. That balance, now a national consensus, is represented by statutes in a majority of States which both recognize an individual's right to refuse unwanted medical treatment and, at the same time, reject any affirmative act to end life. *See* ns. 14-16, *supra*. Whether that balance should be abandoned and the line redrawn to permit an individual to commit suicide without state interference, and then redrawn yet again to permit assisted suicide, is a matter appropriately left for the people to decide, through their duly elected representatives or by initiative ballot.[42] The principles of federalism embodied in our Constitution require no less.

As the States grapple with the difficult questions presented by the ever-increasing ability of medical technology to prolong life, the corresponding need to allow the States to serve as laboratories for change becomes paramount.[43] Indeed, as this Court has recognized, "[t]he science of government . . . is the science of experiment, . . . " *Garcia v. San Antonio Metro.*, 469 U.S. 528, 546 (1985) (citation and internal quotes omitted). While "[t]his Court has the power to prevent experiment" (*New State Ice*

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[42] *See People v. Kevorkian*, 447 Mich. 436, 481-482, 527 N.W.2d 714, 733 (1994), *cert. denied*, 115 S.Ct. 1795 (1995), and *Donaldson v. Lungren*, 2 Cal.App.4th 1614, 1623, 4 Cal.Rptr.2d 59, 64 (1992).

[43] *Cf. San Antonio School District v. Rodriguez*, 411 U.S. 1, 50 (1973) ("No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education."). *See also Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("federalist structure of joint sovereigns preserves to the people numerous advantages" including "allow[ing] for more innovation and experimentation in government; . . . [insert added]").

Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)), it should refrain from doing so here.[44]

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

Id.

A decision affirming the Second Circuit's opinion in *Quill* will effectively extinguish the power of the States to continue to serve as laboratories for change on an issue that

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[44] Just such an experiment may soon take place in the State of Oregon where, in November of 1994, the people voted to accept Measure 16, a ballot initiative allowing a terminally ill, mentally competent adult to obtain a physician's prescription for the purpose of ending his/her life. While Measure 16 has been declared unconstitutional as violative of the Equal Protection Clause, and its operation permanently enjoined by the district court (*Lee v. State of Oregon*, 891 F.Supp. 1421, 1438-1439 (D.Or. 1995)), that decision is presently on appeal to the United States Court of Appeals for the Ninth Circuit, which recently heard oral argument in the case. Should Measure 16 ever take effect, the eyes of the Nation will turn to Oregon to see whether a State can safely walk down a road which history has taught us is fraught with danger. *See When Death is Sought*, at 133-134 (reporting abuses, including nonvoluntary euthanasia, which have occurred in the Netherlands where, since 1984, guidelines have tacitly allowed the practice and concluding that "If euthanasia were practiced in a comparable percentage of cases in the United States, voluntary euthanasia would account for about 36,000 deaths each year, and euthanasia without the patient's consent would occur in an additional 16,000 deaths.") *See also Rodriguez v. Attorney General of Canada, et al.*, 3 S.C.R. 519, 603 (1993) (decision upholding Canada's ban on assisted suicide, noting: "Critics of the Dutch approach point to evidence suggesting that involuntary active euthanasia (which is not permitted by the guidelines) is being practised to an increasing degree. This worrisome trend supports the view that a relaxation of the absolute prohibition takes us down 'the slippery slope'. [insert original]") (Sopinka, J., writing for the majority).

arguably will affect more lives than any other issue the States will face in the foreseeable future. It will also "invite[] an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes." *Garcia v. San Antonio Metro.*, 469 U.S. 528, 546 (1985). At the same time, it will "relegate the States to precisely the trivial role that opponents of the Constitution feared they would occupy."[45] *Garcia, supra*, 469 U.S. at 575 (Powell, J., dissenting) (footnote omitted). In the words of Circuit Judge Kleinfeld, "[t]he Founding Fathers did not establish the United States as a democratic republic so that elected officials would decide trivia, while all great questions would be decided by the judiciary." *Compassion in Dying v. State of Washington*, 79 F.3d 790, 858 (9th Cir. 1996) (Kleinfeld, C.J., dissenting).

CONCLUSION

For all the foregoing reasons, the judgment of the United States Court of Appeals for the Second Circuit in No. 95-1858 should be reversed.

Respectfully submitted,

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[45] "If the several States in the Union are to become one entire Nation, under one Legislature, the Powers of which shall extend to every Subject of Legislation, and its Laws be supreme & controul the whole, the Idea of Sovereignty in these States must be lost." Samuel Adams, Letter to Richard Henry Lee, 3 Dec. 1787, in *The Writings of Samuel Adams* 4:324 (Harry A. Cushing ed. 1968).